

MEMORANDUM 2023-43

Antitrust Law: Status Report

This memorandum provides an update on the status of the Commission's study of antitrust law.¹ The latest developments are described below.

OCTOBER MEETING

Commissioners have expressed interest in hearing from representatives of the United States Senate and the New York State Senate, to discuss the antitrust reform bills that were introduced in those bodies. In the resolution that assigned the Commission this study, the Commission was expressly directed to consider the content of those bills.²

The staff had arranged for a presentation on the federal reform effort, but the U.S. Senate Judiciary Committee staff member who agreed to speak has since changed jobs. She is no longer able to participate. The staff will try to find a substitute speaker for the December meeting or early next year.

The following persons will speak during the October meeting, to discuss the pros and cons of the New York State reform bill:

- New York State Senator Michael Gianaris, Deputy Senate Leader, author of the New York reform bill.
- Eric Stock, Gibson, Dunn & Crutcher LLP, who was a critic of that bill.

The staff intends that each presenter make a brief presentation (15-20 minutes), followed by 20 to 30 minutes of Commissioner questions. Brief biographies of the two speakers are attached to this memorandum.

DECEMBER MEETING

The Uniform Law Commission is currently working on a draft of a uniform act on Antitrust Pre-Merger Notification. The Reporter (drafter) for that project is Professor

¹ Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Most materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

² See 2022 Cal. Stat. res. ch. 147.

Daniel Crane of the University of Michigan Law School. Professor Crane has agreed to make a presentation on the ULC's proposal at the Commission's December 21, 2023, meeting. Details will be worked out as December draws closer.

ANTITRUST CONSULTANT

The Commission recently expressed interest in hiring an expert consultant to assist with the antitrust study.

The staff recommends that Cheryl Lee Johnson be hired to serve in that capacity.

Summary of Ms. Johnson's Qualifications

Ms. Johnson has deep knowledge of federal and California antitrust law and the community of practitioners and scholars who specialize in that topic. She graduated from Columbia Law School, where she was an editor of the *Columbia Law Review* and a Harlan Fiske Stone scholar.

She has handled complex antitrust and business litigation throughout her legal career. After some thirty years as a partner in two major national law firms, she joined the Antitrust Section of the California Attorney General's office in 2006, where she led and managed major antitrust litigation cases involving the healthcare, pharmaceutical, grocery, sports, electronics, and software industries. She has led or been on the executive committees of numerous multistate antitrust suits involving claims of monopolization, product hopping, pay-for-delay agreements, price-fixing and other forms of anticompetitive conduct. She has secured numerous major settlements and consent decrees and challenged several multi-billion-dollar mergers. She co-chaired the National Association of Attorneys General Antitrust Pharmaceutical Industry Working Group for some six years. She was the Chair of the California State Bar Antitrust Section and the California Antitrust Lawyer of the Year for the State Bar in 2017. She recently retired from her position at the California Attorney General's office.

In addition to her practice as an antitrust attorney, Ms. Johnson served as the Editor-in-Chief of the *California State Antitrust and Unfair Competition* treatise for over 23 years. That work demonstrates her ability to lead a team of experts and oversee the production of a complex, comprehensive, neutral, and authoritative legal publication. That experience is directly relevant to important parts of the work she would be asked to do with the Commission.

The staff has also been impressed by Ms. Johnson's useful input into the study to date. Shortly after the commencement of this study, Ms. Johnson began an informal

correspondence with staff, offering her insights into how the study might be structured. Her ideas and connections have been extremely helpful.

Terms of Consultant Agreement

The staff envisions that the consultancy would be structured as follows:

- *It would begin on January 1, 2024.* This is the point at which the Commission's work on antitrust will move past its initial information gathering phase and into active deliberations. It will also be the point at which the working groups' background reports will be ready for compilation.
- *The initial contract would be for six months, until the end of the 2023-24 fiscal year.* The Commission could then decide whether to extend the agreement into the 2024-25 fiscal year. An initial six-month commitment will not overtax the Commission's current budget, which will already be bearing a significant burden associated with the retirement of the Executive Director.
- *The position will be compensated.* In the past, nearly all Commission consultant contracts included modest compensation and the reimbursement of travel expenses.³ The staff proposes that this consultant contract also include compensation. Ms. Johnson is already acting as a volunteer contributor to one of the working groups. The work as consultant would be in addition to her volunteer contributions. The staff believes that compensation of \$10,000, plus reimbursement of expenses, would be fair for the first six months.
- *The work performed by the consultant would include the following:*
 - Assist the staff with compiling the working group reports.
 - Assist the staff with preparing memoranda for consideration at Commission meetings.
 - Assist with coordinating the input of antitrust stakeholders.
 - Attend Commission meetings at which the antitrust study is considered, to respond to Commissioner questions and to volunteer information and opinion when helpful. Attendance could be by teleconference.

The description of tasks above is intentionally somewhat general. By the time that the consultancy is expected to begin, the current Executive Director will have retired. The staff believes it would be best to allow the new Executive Director to work out the specific details of the consultant's work.

³ See *Commission Handbook of Practices and Procedures* § 855.

Decision

The Commission's approval is required before the Executive Director can execute a contract (other than routine operational contracts).⁴ In the past, the Executive Director has always sought the Commission's approval before entering into a contract for expert consulting services.

The Commission needs to decide whether to approve a contract with Ms. Johnson, along the lines described above. If approved, the staff will take care of the formalities.

PUBLIC COMMENT

The Commission received the following letters, which are attached for the Commission's consideration:

- Letter from American Economic Liberties Project, California Nurses Association/National Nurses United, Democracy Policy Network, Main Street Alliance, National Community Pharmacists Association, Open Markets Institute, Revolving Door, Small Business Majority, Student Borrower Protection Center, Towards Justice, Writers Guild of America West (8/16/23).
- Letter from Khara Boender, State Policy Director, Computer & Communications Industry Association (9/28/23).

Respectfully submitted,

Brian Hebert
Executive Director

⁴ See *Commission Handbook of Practices and Procedures* § 900.

BIOGRAPHIES OF PRESENTERS

New York State Senator Michael Gianaris

Senator Michael Gianaris represented District 36 in the New York State Assembly from 2001 to 2010, and has represented District 12 in the New York State Senate since 2011. He was appointed Deputy Majority Leader of the New York State Senate in 2019. His Senate website describes his general policy orientation as follows:

Guided by the principle that the playing field between everyday New Yorkers and powerful interests is grossly skewed in favor of the wealthy, Senator Gianaris is a progressive champion for tenants' rights, better subways, election reforms, a fairer criminal justice system, LGBTQ+ equality, and ending unfair economic development policies. As a member of the leadership of the largest Democratic Senate Majority in over a century, Senator Gianaris is proud to partner with progressive advocates and grassroots leaders to deliver results after years of lost opportunity.

See <https://www.nysenate.gov/senators/michael-gianaris>. Further information about the Senator's history and policy priorities can be found at that site.

Eric J. Stock

Eric J. Stock is a partner in the New York office of Gibson, Dunn & Crutcher. Mr. Stock's practice focuses on antitrust litigation and investigations, especially for clients in the pharmaceutical, financial services, high tech, and health care industries. He is a member of Gibson Dunn's Antitrust and Competition and Litigation Practice Groups.

Mr. Stock's practice involves all aspects of antitrust enforcement, including civil and criminal government investigations, merger clearance, and working with international regulators. He frequently is responsible for coordinating a client's response to antitrust investigations and civil litigation in multiple jurisdictions and proceedings. He has extensive experience litigating class actions and other civil antitrust cases in federal court, including defending clients accused of unlawful monopolization, collusion, and anticompetitive transactions. Mr. Stock has particular experience counseling and litigating matters where a client faces antitrust scrutiny as a result of its defense of its intellectual property rights. In 2014, Mr. Stock served as the lead trial lawyer in a pharmaceutical monopolization case in the Southern District of New York. Mr. Stock's success at trial was affirmed by the U.S. Court of Appeals for the Second Circuit.

Mr. Stock served for three years as Chief of the Antitrust Bureau at the New York Attorney General's Office ("NYAG"). In that role, he was responsible for overseeing the enforcement of New York State's antitrust laws and representing the interests of New York and its consumers in national antitrust matters. During Mr. Stock's tenure at NYAG, he served as lead counsel and lead trial attorney for New York in several noteworthy antitrust litigation matters and supervised dozens of antitrust investigations led by the state. He also had extensive experience partnering with the U.S. Department of Justice and Federal Trade Commission in joint federal and state investigations of

proposed mergers or other business conduct. For example, he served as lead counsel for New York in the successful lawsuit brought by New York and the U.S. Department of Justice challenging an allegedly anticompetitive merger of Manhattan tour bus operators.

During his time at NYAG, Mr. Stock regularly worked with other state AG offices throughout the country on antitrust or related complex business litigation issues. In addition, in early 2016, Mr. Stock served as NYAG's Acting Executive Deputy Attorney General for Economic Justice, a position which supervises much of the office's business-related affirmative litigation, including cases filed under the Martin Act and state deceptive practices laws.

See <https://www.gibsondunn.com/lawyer/stock-eric-j/>. Further information about Mr. Stock's honors, writings, and representation can be found at that site.



August 16, 2023

Mr. Brian Hebert
Executive Director
California Law Review Commission
c/o UC Davis School of Law
400 Mark Hall Drive
Davis, CA 95616

Honorable Chair Carrillo and Commission Members:

The above and undersigned organizations hereby write to express our ongoing interest and optimism regarding the California Law Revision Commission’s Study B-750 on antitrust and fair competition laws.¹ We also believe it is incumbent upon the Commission to invite and encourage participation by members of the public – including the consumers, workers, and small business owners most impacted by abuses of corporate power.

Over the past several months, the Commission has listened to compelling presentations regarding the history of federal antitrust laws, the application of antitrust laws to contemporary digital markets, and comparable European antitrust regulation.² We are encouraged by the robust critique of the “consumer welfare standard,” which is a phrase that has never appeared in the text of antitrust laws but has nevertheless played an outsized role in the interpretation of those laws over the past half century. The Commission has heard about renewed efforts to restore the original intent of the antitrust laws, to articulate their policy goals broadly, and to eliminate or truncate efficiency defenses.

¹ In 2022, the California Legislature authorized the California Law Revision Commission to study the present state and potential revisions to California’s antitrust and unfair competition laws. <http://www.clrc.ca.gov/B750.html>

² Prior meeting agendas are archived here: http://www.clrc.ca.gov/Menu1_meetings/prior_agendas.html

We are also encouraged by the focus on gaps in California’s antitrust and unfair competition laws. To the extent California law addresses “single-firm” anticompetitive conduct—namely, conduct that does not require an agreement between two or more firms—the Commission has learned that California law could go further by adopting an “abuse of dominance” standard akin to that proposed by New York’s 21st Century Antitrust Act.³ Further, the Commission has learned that the currently available remedies under California state law are plainly inadequate and fall short of meaningful disincentives for the abuse corporate power.

Since the Commission began its study, we have witnessed a surging interest by state lawmakers in California and across the country to address harms coincident to corporate dominance. In California alone, lawmakers have sought to protect workers with bans on non-compete clauses, “TRAPs,” and other restraints on worker mobility.⁴ Six bills were introduced to prohibit unfair and deceptive “junk fees.”⁵ At least two “right to repair” bills seek to prohibit warranty tying provisions that restrict consumers’ ability to repair goods that they purchased.⁶ Several bills have sought to curtail the prevalence of unfair and deceptive practices in the event ticketing industry.⁷ The Journalism Preservation Act would address the extractive business models of dominant social media platforms by allowing publishers to bargain for the fair market value of their content.⁸ Amid concerns surrounding the proposed Kroger-Albertsons merger, several bills would create additional transparency and worker protections in the event of grocery store mergers.⁹ This non-exhaustive list illustrates the breadth of harm caused by dominant corporations—and a foundation for broader legislative solutions.

Beginning in September 2023, seven working groups will provide initial drafts to the Commission of reports on a range of sub-topics, including mergers and acquisitions, single firm conduct, the consumer welfare standard, and concentration in California.¹⁰ **We encourage the Commission to make all working group draft reports available for public review, so that workers, small business owners, and other interested members of the public may also comment on their preliminary findings.**

³ On June 7, 2023, NY Senate Bill S6748, the “21st Century Antitrust Act,” passed the New York Senate by a vote of 43-18.

⁴ Assembly Bill 747 (unlawful employee contracts); Assembly Bill 1047 (noncompete agreements)

⁵ Senate Bill 478 (Consumer Legal Remedies Act); Senate Bill 611 (residential rental properties); Senate Bill 666 (small business commercial financial transactions); Assembly Bill 8 (ticket sellers); Assembly Bill 537 (short-term lodging); Assembly Bill 1222 (rental passenger vehicles)

⁶ Senate Bill 244 (Right to Repair Act); Senate Bill 271 (powered wheelchairs: right to repair)

⁷ Assembly Bill 8 (ticket sellers: junk fees); Senate Bill 785 (consumer protection: ticket resellers); Senate Bill 829 (ticket sellers: venue exclusivity)

⁸ Assembly Bill 886 (the California Journalism Preservation Act)

⁹ Senate Bill 725 (protections for grocery workers); Assembly Bill 647 (protections for grocery workers); Assembly Bill 853 (retail grocery and retail drug stores: acquisition: notice to Attorney General)

¹⁰ A description of the working groups and their participants can be viewed here:

<http://www.clrc.ca.gov/pub/2023/MM23-16.pdf>

While the working groups include esteemed scholars and practitioners in the fields of law and economics, we believe it is critical that the Commission also invite and encourage participation by workers and small business proprietors who experience the effects of corporate power first-hand. It is likewise critical for the Commission to hear from advocacy organizations who, through representation of their constituent stakeholders and extensive analysis of political, legal, and economic trends, can provide necessary insight regarding the real-world harms that occur when corporate power is abused.

Thank you for your consideration and ongoing study.

Sincerely,

American Economic Liberties Project
California Nurses Association/National Nurses United
Democracy Policy Network
Main Street Alliance
National Community Pharmacists Association
Open Markets Institute
Revolving Door
Small Business Majority
Student Borrower Protection Center
Towards Justice
Writers Guild of America West

Cc: CA Assemblymember Buffy Wicks, primary sponsor, ACR 95



September 28, 2023

California Law Revision Commission
Attn: Brian Hebert, Executive Director
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Re: California Law Revision Commission - Study B-750 (Antitrust Law)

Dear Executive Director Hebert and Members of the California Law Revision Commission:

On behalf of the Computer & Communications Industry Association (CCIA)¹, I write in response to the California Law Revision Commission's ongoing work pursuant to Study B-750 (Antitrust Law). CCIA has long advocated for sound competition policy and antitrust enforcement. We appreciate the opportunity to provide input to the Commission's ongoing study of antitrust law.

Competition is a fundamental driver of innovation, particularly in the technology sectors where the industry is characterized by rapid advances driven by dynamic competition. As a result of the competitive process, companies that offer better products and services often benefit from increased returns. This cycle incentivizes firms to continue investing in innovation that allows them to develop higher quality goods and services at a lower price to the benefit of consumers.

Thank you in advance for considering our detailed comments and resources included below.

Businesses depend on regulatory certainty and predictability. Efforts that may undermine such certainty could have severe economic consequences.

Study B-750 authorizes the Commission to, among other items, study "...whether [state antitrust law] should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's 'Twenty-First Century Anti-Trust Act...". CCIA previously expressed concerns to the sponsor of the aforementioned proposed New York legislation.² CCIA cautions against pursuing an approach similar to New York's proposed legislation, particularly by creating uncertainty surrounding a new state-specific "abuse of dominance" standard, for which there is no existing federal U.S. precedent. Failure to define key terminology upfront creates a moving target for enforcement and poses greater legal uncertainty for companies operating in the state, which would have important implications for California's business environment.

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more information, visit www.ccianet.org.

² CCIA comments in opposition to S 933A, The Twenty-First Century Antitrust Act, <https://www.ccianet.org/wp-content/uploads/2021/05/2021-27-05-CCIA-Comments-on-New-York-Antitrust-Gianaris.pdf>.

Many entrepreneurs launch a business with the intention of eventually being acquired by another company. Pursuing any amendments to current antitrust laws, particularly at the state level, could undermine these efforts by creating an environment of uncertainty for both sellers and acquirers. Studies³ have shown how IPOs are done by bigger and richer companies but are too costly for smaller startups. These entrepreneurs usually have a simple acquisition or several rounds of venture capital investment as the only ways to obtain the resources needed to continue developing their idea into a marketable product.⁴

Acquirers and investors rely on clear, established laws and standards to help determine whether a proposed transaction or practice constitutes a violation; new, ambiguous rules will leave them hesitant to acquire startups. Conversely, firms encountering potentially objectionable behavior in the marketplace will not have certainty as to what practices are, in fact, permissible.

Pursuing this type of approach would also impose increased penalties that would inevitably have a chilling effect on business investment. Any increase in penalties, particularly drastic ones such as under New York’s proposed change, sends a threatening message to companies of all sizes seeking to engage in merger transactions. Uncertainty and lack of legal and regulatory predictability for business transactions and new, more severe penalties, would strongly disincentivize companies from conducting business in California. This is especially concerning during a time when many companies are exploring opportunities to relocate from California to states perceived to have more business-friendly policies.⁵

The “consumer welfare standard” provides an objective approach to antitrust policy.

In February 2023, the Commission’s meeting included a discussion of the consumer welfare standard, including proposed reforms to the standard, and received a presentation from Professor Thomas Greene. CCIA appreciates the opportunity to build on this discussion. For over 40 years, since the 1970s,⁶ the consumer welfare standard has helped to structure a framework in antitrust law that provides for objectivity over subjectivity, prioritizing

³ See, e.g., “Exits, Investment, and the Startup Experience: the role of acquisitions in the startup ecosystem, Engine and Startup Genome” (Oct. 24, 2022), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/6356f5ccf33a6d5962bc7fd8/1666643406527/Exits_Investment_Startup_Experience_role_of_acquisitions_Report_Engine_Startup_Genome.pdf; Susan Woodward, “Irreplaceable Acquisitions: Proposed Platform Legislation and Venture Capital” (Nov. 8, 2021), http://www.sandhillecon.com/pdf/Woodward_Irreplaceable_Acquisitions.pdf.

⁴ *Id.*

⁵ Forbes, “Wall Street banks and tech companies are fleeing New York and California”, <https://www.forbes.com/sites/jackkelly/2020/12/14/wall-street-banks-and-tech-companies-are-fleeing-new-york-and-california/?sh=31da7de3661a> (last visited August 21, 2023).

⁶ See OECD (2023), The Consumer Welfare Standard - Advantages and Disadvantages Compared to Alternative Standards, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/consumer-welfare-standard-advantages-and-disadvantages-to-alternativestandard-s-2023.pdf.

competition over competitors.⁷ This approach helps to ensure economic efficiency, delivering lower prices, higher quality, more innovation, and other benefits for consumers.⁸ Notably, during this same time period, technology companies in California specifically have blossomed.

Digital platforms provide consumers and businesses with tremendous benefits. CCIA recommends that any new legislation or regulation focused on competition policy take into account wider potential implications for consumer protection and consumer welfare, impact on innovation, and the interplay with other policy areas such as data privacy, national security, cybersecurity, and intellectual property.⁹

Conversely, adopting an EU-style model to antitrust law risks impeding competition and innovation.

As commentators have highlighted, the European Union’s abuse of dominance standard has led to the EU’s overenforcement of competition rules for several decades.¹⁰ In the EU, a company is considered to hold a dominant position with just 39% of the market. In this position, they are required to abide by unique guidelines that restrict their ability to grow and thrive. In contrast, U.S. federal antitrust law requires a more meaningful and significant market share to find a “monopoly”.¹¹ As a result, the U.S. has seen rapid innovation and a thriving business environment. Under the EU’s abuse of dominance provisions, the ultimate goal of competition law and policy is to maintain a competitive playing field with multiple players. In effect, this can create a *disincentive* for businesses to compete more aggressively; this, by extension, may result in fewer benefits realized by consumers. Therefore, CCIA discourages California from applying an EU-style model, as it will likely lead to decreased competition and innovation in the tech sector, to the detriment of both consumers and California’s economy.

CCIA advocates for a uniform, evidence-based national approach to antitrust law.

Businesses, particularly those in the technology sector, are increasingly operating across state lines, and in doing so, are tasked with navigating complex compliance regulations. Proposing new, state-specific rules would only add to the difficult considerations companies face when

⁷ See Hovenkamp, H. (2020), “Antitrust: What Counts as Consumer Welfare?”, https://scholarship.law.upenn.edu/faculty_scholarship/2194 (accessed on August 21, 2023);

⁸ See “Who is Meant to be Protected by Antitrust Law and Policy?”, <https://www.project-disco.org/competition/112322-who-is-meant-to-be-protected-by-antitrust-law-and-policy/#.Y4VAwezMI3Q> (November 23, 2022).

⁹ See “Abandoning the Consumer Welfare Standard to Target Tech Would Harm Users,” <https://www.project-disco.org/competition/abandoning-the-consumer-welfare-standard-to-target-tech-would-harm-users/> (March 7, 2023).

¹⁰ See OECD (2020), Abuse of dominance in digital markets,, www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf; see further “Comparison of Competition Law and Policy in the US, EU, UK, China and Canada” (December 16, 2021), <https://bipartisanpolicy.org/blog/comparison-of-competition-law-and-policy-in-the-us-eu-uk-china-and-canada/>

¹¹ United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945); Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989).



seeking to expand or move across state lines, with those rules providing no apparent benefits, but with additional and costly regulatory burdens instead. For example, regulations, laws, and enforcement actions targeting only technology companies, with no evidence-based reason behind them, would increase operating costs for U.S. companies. Reducing their market value and thus harming shareholders would potentially result in billions of dollars of long-term losses to state and local government employee pension plans.¹²

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While CCIA primarily focuses on promoting competition in the technology sector, our experience tells us that sweeping regulations may impact the business community writ large. We strongly advise against adopting broad new policy changes that will likely lead to unintended consequences for all business sectors, including the tech sector that has grown to be a huge economic driver in California. We encourage the Commission to pursue recommendations that reflect data-driven solutions to help attract innovative, productive businesses and spur economic growth that benefits all Californians. We appreciate your consideration of these comments and stand ready to provide additional information as the Commission continues its study of antitrust law.

Sincerely,

Khara Boender
State Policy Director
Computer & Communications Industry Association

¹² CCIA Research Center, “Regulatory Overreach Targeting Tech Would Cost California State and Local Government Employee Pension Plans Billions”, <https://research.ccianet.org/stats/regulatory-overreach-targeting-tech-would-cost-california-state-and-local-government-employee-pension-plans-billions/> (last accessed August 21, 2023).